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STATUS OF PREPARATION OF PUBLICATIONS, STUDIES AND DOCUMENTS FOR THE WORLD CONFERENCE

Note by the Secretariat

Addendum

Submission by the American Association of Jurists

1. The attention of the Preparatory Committee is drawn to the submission annexed, entitled "Criminalization of violations of the right to development and economic, social and cultural rights". The paper was prepared by Alejandro Teitelbaum, the Permanent representative in Geneva of the American Association of Jurists. In the covering letter, the American Association of Jurists asked for the paper to be circulated as a document at the fourth session of the Preparatory Committee and at the World Conference on Human Rights.

2. The submission suggests that the World Conference should adopt a resolution declaring the policies and practices of States, institutions and individuals that hamper enjoyment of the right to development and economic, social and cultural rights to be international delicts (crimes). It also suggests an optional protocol to the International Covenant on Economic, Social and Cultural Rights, and proposes that the Economic and Social Council should seek an advisory opinion from the International Court of Justice as to whether relations between the United Nations and international financial bodies, and the policies of those financial bodies, are consistent with the Charter of the United Nations.

Annex

CRIMINALIZATION OF VIOLATIONS OF THE RIGHT TO DEVELOPMENT AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS

by Alejandro Teitelbaum

INTRODUCTION

1. While there is broad agreement on the substance or essence of economic, social and cultural rights, the same cannot be said about the right to development, which has been subject to many different interpretations, some people going so far as to deny its very existence. Thus it would appear necessary before delving into the subject to outline our interpretation of the right to development: what, given that our subject is the punishment of violations of the right to development, is this legal property to be protected by the new international penal device sketched out below?

2. With this in mind, we cite a fragment of a text prepared in 1989 by the International League for the Rights and the Liberation of Peoples for submission to the Global Consultation on the Right to Development as a Human Right, which took place in Geneva from 8 to 12 January 1990.

> "... The traditional development strategy predominant on the international level generally consists of the formation of modern industrial enclaves in underdeveloped countries. Rather than produce multiplying effects on the whole of the host country's economy, as is sometimes stated, these enclaves often produce negative effects. This occurs, for example, when a local traditional industry, generally labour-intensive, with a low rate of fixed capital (traditional textile industry, shoe industry, food processing, etc.) cannot compete with a new and more technologically advanced industry (which employs much less labour), and is forced to close its doors, depriving many people of their jobs. The introduction of modern industry is usually part of the transnational enterprise's strategy to disperse production in different countries. The affiliates produce components of the final product (as part of the productive process of the firm, internationally integrated), or the final product, which, in the majority of cases, is destined for the exterior market or for a protected internal market. This type of installation tends to be unstable, as the parent firm can decide for commercial (market problems), technical (access to primary resources), economic (labour costs), and even political reasons, to transfer the affiliate to another country. Another factor which leads to the installation of industries in underdeveloped countries is environmental; high-contaminating industries which are displaced from developed countries to developing ones ...
>
> "... Globally, as a socio-economic consequence of traditional development strategies, there exists in developing countries a privileged elite with the same patterns of consumption as high-level income groups in developed countries, and at the same time, a large mass of the population that cannot manage to satisfy its basic material and non-material necessities. The existing gap is widening between the elite

of the population (progressively wealthier and fewer in number) who benefit from these strategies, and the ever-growing fringes of the population living in poverty and extreme poverty.

"It is necessary to indicate that this phenomenon of accentuation of social differences also manifests itself in developed countries, as recent statistics indicate. In summary, the traditional strategies of development are centred on product-based growth. Harmonic economic development which takes environmental factors and the rational use of natural resources into account is not the objective of such strategies. Nor do they take into account what is produced, and for whom. The protagonists and the beneficiaries are a minority; the majority are the passive subjects and those harmed by these strategies.

"Taking the Declaration on the Right to Development as our basis, we must continue to develop our thinking on the concept of development, bearing in mind in particular:

1. That it is a comprehensive process whose main subject is the human being and whose purpose is the full realization of human beings in all respects (physical, intellectual, moral and cultural) within the community;

2. That this process requires the active and conscious participation of individuals and communities in decision-making at all stages, from determination of objectives and means of achieving them through their implementation and assessment of results;

3. That the right to development encompasses the right to enjoy civil and political freedoms and the absence of any type of discrimination;

4. That there is no single or pre-established model for development, which is why genuine development requires the self-determination of peoples, recognition of their sovereignty over their natural resources and wealth, and full respect of their cultural identity;

5. That development is not a problem which concerns solely the 'developing' countries, but an objective of interest to the entire international community, because of the interdependence of all nations ..." 1/

I. THE RIGHT TO DEVELOPMENT AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS PART OF CURRENT POSITIVE INTERNATIONAL LAW

3. The process of decolonization in the 1970s resulted in the emergence of many new independent States, giving the poor countries as a whole more political weight within the international community and enabling them to win approval for new sets of standards which concentrated the right to development and specifically enunciated, in the 1966 International Covenant on Economic, Social and Cultural Rights, economic, social and cultural rights previously set forth in the Charter of the United Nations (preamble and Art. 55) and

the 1948 Universal Declaration of Human Rights (arts. 22 to 28). Many other international instruments refer to this category of rights: the 1968 Proclamation of Tehran; the Declaration on the Establishment of a New International Economic Order (General Assembly resolution 3201 (S-VI)); the Programme of Action on the Establishment of a New International Economic Order (General Assembly resolution 3202 (S-VI)); the Declaration on Social Progress and Development (General Assembly resolution 2542 (XXIV)); the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)); the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX)); the resolution on Development and International Economic Cooperation (General Assembly resolution 3362 (S-VII)); the 1944 Philadelphia Declaration annexed to the ILO Constitution; the Tripartite Declaration of Principle concerning Multinational Corporations and Social Policy, approved by the Governing Body of ILO in 1977; the 1986 Declaration on the Right to Development (General Assembly resolution 41/128), and, on the regional level, the European Social Charter, the African Charter of Human and Peoples' Rights (arts. 20, 21 and 22), the Protocol amending the Charter of the Organization of American States (Protocol of Cartagena de Indias, December 1985) and the Additional Protocol on Economic, Social and Cultural Rights to the Charter of OAS (Protocol of San Salvador, 1988).

4. Thus there was established a new category of human rights. Unlike civil and political rights, these were chiefly obligations on the part of States to act - in other words, to introduce policies designed to safeguard enjoyment of those rights - but included obligations not to act, not to interfere, but instead to respect other States' rights to self-determination and sovereignty over their natural resources, etc.

5. The developed countries have been extremely unforthcoming about this new category of rights. Even today, representatives of the United States at international meetings continue to uphold the position that development is a fact and can be an objective of national policy but is not a right. This position is manifestly unsustainable since the international instruments cited above are obligatory, being binding or jus cogens, as established by Articles 1 and 56 of the Charter of the United Nations, articles 18, 26, 38, and 53 of the Vienna Convention on the Law of Treaties and article 38, paragraph 1 (b), of the Statute of the International Court of Justice. It is also the opinion of many distinguished jurists. 2/

6. Inequality among nations is not an accident of fate. As in national law labour law grew up from the recognition that civil contractual law was inadequate to deal with situations where the contracting parties had unequal bargaining power, the right to development emerged in international law as a result of the economic inequality and disadvantageous situation of the underdeveloped countries, and as a right to reparation for countries which had been plundered of their wealth over long periods, (chapter 1, principle (i), of The Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX))). Henceforward the notion of equity was to be added to the notion of justice.

II. A CURRENT WORLD PHENOMENON: THE CONCENTRATION OF WEALTH AND THE SPREAD OF POVERTY

7. Many books and papers have been published, and many speeches made, to show the flagrant social inequalities that exist among human beings. But the diagram and explanatory text on the cover of the Human Development Report 1992 by the United Nations Development Programme (UNDP) are more eloquent than many speeches and papers. The inequalities are greater than ever: the difference in income between the wealthiest fifth and the poorest fifth of the world's population, taken in blocks of countries, went from a ratio of 30:1 in 1960 to 59:1 in 1989. If income distribution within each country is taken into account, the difference between the richest and the poorest on the global scale goes up to 140:1. 3/ The numbers of poor people, in absolute and relative figures, continue to grow: in Latin America and the Caribbean, for example, from 136 million in 1980 to 266 million in 1992, or from 41 per cent to 61 per cent of the population. 4/ The World Bank, arbitrarily setting the poverty threshold for all developing countries at $370 per year of purchasing power per capita ($1 per person per day!), calculated that 19 per cent of the population of Latin America and the Caribbean lived in poverty in 1985. 5/ The drama in Somalia should not make us forget that around the world 15 million children aged under 5 die every year, and 100 million will have died by the end of the century. 6/

8. According to one interpretation, the nearly 4,000 million poor people in the world today are poor because they are lazy and incapable or unwilling of following the example of the millions who enjoy well-being as a reward for their hard work and spirit of initiative. History shows, however, that these enormous inequalities are the result of centuries of pillage and exploitation: civilizations were destroyed, along with social formations and indigenous modes of production, and the ecosystems of Africa, America and Asia were seriously damaged. The plunder of many countries and the pauperization of the majority of the world's population continues under different forms: deteriorating terms of trade, debt renegotiation, transfers of resources from the South to the North, capital flight, structural adjustment, massive and indiscriminate deforestation, export of toxic wastes, establishment of contaminating industries, (World Bank-financed) environmentally unsound reforestation programmes, etc.

9. Two important factors in the process of pauperization are the introduction of new technology (robots) in production, costing millions of jobs, and the extreme mobility of industrial plant: every five years on average the electronics industry embarks on a process of relocation. Clothing factories which used to employ two and a half million people in Hong Kong have moved to southern China, Mauritius, Botswana and Jamaica, where wages are lower. The clothing industry has also reappeared in Los Angeles and New York as a parallel economy: in Los Angeles it employs illegally resident Mexicans at rock-bottom wages. London and New York, which in recent years have lost a quarter of their manufacturing industry, have large numbers of jobless and homeless people who survive in sub-human conditions. 7/ According to the Conquiste del Lavoro, published by the Italian Confederation of Free Trade Unions, of 17 November 1992, General Motors workers in the United States are afraid that the free trade agreement between the United States and Mexico will leave them without jobs because the company can transfer plants to Mexico

where labour costs are one-twentieth of those in the United States. Declining living standards for the majority of the population are a universal phenomenon: it was recently reported that in 1992 the French consumed 100 billion francs less than in 1991, and it is expected that the "Restaurants du coeur" which serve free meals to the worst-off will be unable to meet substantially increased demand in the winter of 1992-1993.

10. In the jobs market, not only will unemployment increase in many countries but working conditions will deteriorate for those who do have jobs, with real wages falling, social security being reduced or virtually dismantled, work-related accidents increasing, etc. According to the 1992 Year Book of Labour Statistics published by the International Labour Office, accidents on the job increased in countries such as Korea, Malaysia, Singapore, Thailand, Spain, France, Germany, Italy and Portugal over the period 1987-1990. 8/

11. At the same time, transactions on the financial markets increased at a staggering rate: the total value of stocks traded worldwide rose from $892 billion in 1974 to $2.8 trillion in 1987. 9/

12. The period of colonial plunder seems to be repeating itself in the self-styled "socialist" countries where, on the advice of the International Monetary Fund, everything is being sold at end-of-season prices: mineral deposits, industries and land, antique and modern works of art, historic buildings and thermal springs, while real salaries plummet and unemployment rises. 10/

13. All the evidence is that the golden rule of transnational, industrial, commercial and financial capital is to maximize profit margins when times are good and maintain them when times are bad, even if the result is extremely undesirable social consequences for a large part of the world population. This is done through legal, semi-legal or completely illegal activities which escape the control of national States, owing to the globalization of the economy and finances.

14. One typical case - perhaps the most far-reaching - of financial capital circulating through legal and illegal conduits is the proceeds from drug trafficking. Experts of the Financial Action Group set up by the seven major Powers at their meeting in July 1989 estimate that total annual sales of cocaine, heroin and cannabis in Europe and the United States amount to $122 billion, of which between 50 and 70 per cent, or approximately $85 billion, is invested or laundered. 11/

III. CENTURIES OF STRUGGLE AGAINST SOCIAL INJUSTICE

15. Throughout the ages there have been attempts to correct the injustice inherent in hunger and poverty in societies where sufficient resources are unequally distributed. In the year 386 B.C. the wheat merchants of Athens who bought more than their quota from the importers were subject to punishment. Lisio called for the death sentence, saying, "When do they obtain the highest profits? When the announcement of a disaster allows them to sell dear. They see your misfortunes with such keen eyes that they know of them before everyone else, or they invent them (...) and their hostility is so great that in times of want they conspire against you like your enemies. They have the

wheat when it is most lacking and they refuse to sell it so that we accept the price unquestioningly". In the seventh century B.C., Kuang Chung, prime minister to the duke Huang of the Ch'i dynasty, advanced the following arguments to recommend the reinforcement of the system of public granaries: "When a year is disastrous or prosperous, grain, in consequence is dear or cheap (...) if the ruler is not careful, the merchants who have built up huge stocks profit from the needs of the people: they sell at a hundred times their original investment". 12/

16. In more modern times, these questions have continued to concern the experts: the First International Congress on the Prevention and Control of Crime, held in London in 1872, included "measures to control delinquent capitalists" (sic) on its agenda. These subjects also appear in "The Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order", adopted at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from 26 August to 6 September 1985, and adopted by the General Assembly in its resolution 40/32. 13/

17. At the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August - 7 September 1990) "Recommendations on international cooperation for crime prevention and criminal justice in the context of development" were adopted and recommended to the General Assembly for approval. The Recommendations called on Governments to develop laws to control and combat transnational crime and illegal international transactions (point 3). Since even legitimate enterprises, organizations and associations may sometimes be implicated in transnational criminal activities affecting national economies, Governments should adopt measures for the control of such activities. Governments should collect information from various sources, so as to have a solid base for the detection and punishment of enterprises, organizations and associations, their officials, or both, if they are involved in such criminal activities, with a view also to preventing similar conduct in the future (point 6). Point 8 recommends that States should review the adequacy of their criminal laws in the fight against corrupt activities of public officials which can hinder development and victimize individuals and groups. 14/

IV. THE RIGHT TO DEVELOPMENT AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS A SOURCE OF INTERNATIONAL, NATIONAL, COLLECTIVE AND INDIVIDUAL OBLIGATIONS

18. The right to development and to the progressive enjoyment of economic, social and cultural rights implies obligations on the part of the international community and each Member State towards its own people and human beings in general, in proportion to available resources. These obligations imply the duty of each State to make the maximum effort to promote the economic, social and cultural development of its people (General Assembly resolutions 2626 (XXV), 3201 (S-VI) and 3281 (XXIX)).

19. Article 12 of the Proclamation of Tehran (International Conference on Human Rights, 1968) is still relevant today: "The widening gap between the economically developed and developing countries impedes the realization of

human rights in the international community ... (it) makes it all the more imperative for every nation, according to its capacities, to make the maximum possible effort to close this gap".

20. The specialized institutions of the United Nations system, such as the International Monetary Fund, the World Bank and others, also have the duty to promote the realization of the right to development (arts. 55, 56, 57, 58, 63 and 64 of the United Nations Charter). The International Court of Justice has said that the rights and the duties of entities such as the United Nations and the specialized agencies must depend upon (their) purposes and functions as specified or implied in (their) constituent documents and developed in practice. 15/

21. The obligations deriving from the right to development also extend to other international entities, such as transnational corporations, manufacturers' associations, unions, etc., as can be concluded from the Philadelphia Declaration of 1944, annexed to the Constitution of ILO and the Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy, adopted by the Governing Body of ILO in 1977. Article 4 of the latter Declaration states that "The principles set out in this Declaration are commended to the governments, the employers' and workers' organizations of home and host countries and to the multinational enterprises themselves", while article 8 states that "All the parties concerned by this declaration should respect ... the Universal Declaration of Human Rights and the corresponding International Covenants". Individuals are also subject to obligations with regard to the right to development (Universal Declaration of Human Rights, preamble and arts. 29, para. 1, and 30).

22. Nevertheless, the international instruments that enshrine the right to development and other economic, social and cultural rights are still powerless to influence the decisions of transnational economic power, the ruling elites of the industrialized countries and the subordinate elites of many underdeveloped countries, as is proven by the deepening deterioration in the living conditions of most of the world's population.

23. The right to development and the economic, social and cultural rights enshrined in numerous international instruments are systematically violated on a global scale, with extremely grave consequences for much of humanity, while no provision is made for international sanctions against the violators. This goes to show once again that a right that does not provide for sanction in cases of violation is a dead letter.

24. This raises the question of a start towards putting an end to impunity for violations of economic, social and cultural rights as an important contribution to an authentic new international economic and social order based on justice and equity.

V. THE NEED TO CLASSIFY VIOLATIONS OF THE RIGHT TO DEVELOPMENT AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS INTERNATIONAL CRIMES

25. Although the violations that we have mentioned are not defined or classified in international law, international criminal law is not unbroken ground. For over a century, instruments have been adopted which define

international crimes. National law specifies numerous economic crimes, among which are the so-called "white-collar crimes". Cherif Bassiouni 16/ enumerates 22 categories of international crime which have been developed through international customary and treaty law (322 international instruments from 1815 to 1984). For a crime to be international, it must have a transnational and/or international element. An example of the first category is a crime committed in one country that produces harmful effects in another, such as the forging of foreign currency. The international element appears when the criminal activity affects the collective security interests of the global community (war of aggression) or violates juridical rights recognized as fundamental by the international community, such as life, physical integrity, the right to non-discrimination (crimes against humanity, genocide, apartheid, torture, etc.).

26. Both transnational and international elements are generally present in the violations of economic, social and cultural rights, in view of the nature of the juridical rights (life, integrity and human dignity, etc.) affected by these violations. Due to the massive character of these violations, the international element is invariably present. There is no doubt whatsoever that economic and financial practices and policies which violate basic human rights, causing the death of millions of human beings through malnutrition or curable diseases, and forcing hundreds of millions to live in subhuman conditions, can be classified as international crimes.

VI. ECONOMIC CRIMES IN DOMESTIC LAW

27. Under domestic law there are often norms that sanction economic crimes, such as the embezzlement of public funds, negotiations that are incompatible with the exercise of public functions, the illicit enrichment of public officials, currency market offences, etc., which directly or indirectly violate the economic, social and cultural rights of the population.

28. Bodies of national legislation that control trusts or monopolies deserve special mention in view of their close link with the subject at issue. An old Argentine anti-trust law, number 11210, adopted in 1923, stated in article 2 that "acts which arbitrarily increase the personal gains of those who perform them, out of all proportion with the actual capital investment, and which constitute neither technical nor economic progress, and those which hinder other living or legal persons in free competition in production and internal commerce or external commerce, shall be considered acts of monopoly or indicative of a monopolistic trend and punishable by law," ... We wish to emphasize this part of the law because it contains a category of offence that we include in a proposed definition of international economic crimes at the end of this paper: that of disproportionate gain with grave injury to third parties.

29. Although anti-trust laws seek to protect the juridical right to free competition, the passive beneficiary is the consumer, the population, which can suffer serious injury as a consequence of prices fixed by monopolies. As Jiménez de Asua says, "... the public, the subject which consumes ... is what inspires the law and animates its spirit and will". 17/ Commenting on the Sherman Antitrust Act of 1890, the United States Supreme Court said in 1958 that unrestrained competition yields "the best allocation of our economic

resources, the lowest prices, the highest quality, and the greatest material progress ..." (Northern Pacific Railroad Co. v. United States, 356 U.S. 1.4, 1958). 18/ For its part, the United Kingdom Restrictive Trade Practices Act of 1956 in article 21 establishes the presumption (allowing evidence to the contrary) that monopolistic agreement is contrary to the public interest. 19/

30. In general, what appear to be economic policy options freely adopted by certain Governments against the interests of their respective populations and in violation of the International Covenant on Economic, Social and Cultural Rights and other international instruments referred to by the right to development, not only serve the exclusive interest of the economic elite, but also result from the kind of pressure and corruption by international economic and financial entities and by transnational firms that tends to be classified as criminal in domestic legislation.

31. Many examples could be given of cases in which the application of ultraliberal economic policies appears to be the fruit of deep convictions, while they are nothing more than a means of obtaining enormous profits illicitly, as bribes and/or stakes in business deals, and using such policies to benefit the economic groups which gravitate around the power structure, contrary to the country's interests and at the expense of the fundamental rights of the population.

32. The privatization and deregulation exercises which are often carried out under such conditions receive technical advice and funding from the World Bank. For example, in December 1992 the Bank approved 30 million dollars credit at 7.6 per cent annual interest for Peru to finance technical assistance for a programme of privatization. Nevertheless, this credit will only be available once Peru has repaid its outstanding debts to the World Bank (official newspaper El Peruano, Lima 15 December 1992). The World Bank not only organizes the plunder of the national wealth of different countries, it also forces the victims of the plunder to pay, and at usurious rates of interest.

33. The criminal penetration of international business covers a broad spectrum, and is moreover not one-sided: where there are corruptible people, there are corruptors. Much of the enormous external debt was contracted under such circumstances; many contracts signed included illicit clauses, sweeteners, usurious interest rates, commissions, and other disproportionate costs. We do not say "usurious interest rates" rhetorically: while the effective long-term interest rate in six industrialized countries averaged 4.35 per cent in the period between 1985-1989, the average effective interest rate on the external debt paid by the six principal debtor countries in the period from 1980-1985 was 16.8 per cent. 20/ A detailed study of the illicit content of numerous contracts which gave rise to Argentina's external debt can be found in: Eric Calcagno "Los Bancos transnacionales y la deuda externa de Argentina" (Transnational banks and Argentina's external debt) Cuadernos de la CEPAL No. 56, United Nations, Santiago, Chile, 1987.

34. It is instructive to examine how bribery of foreign officials is handled in different countries. In 1977, as a result of the cases involving bribes paid by Lockheed, Northrop and the Gulf Oil Companies, the United States

adopted a law on corrupt practices abroad. But European legislation is much more "liberal" and does not punish the bribery of foreign officials. Moreover, in Germany and Switzerland, the Treasury authorizes tax deductions on such expenses, i.e., corruption is legalized. 21/

35. The United Nations Commission on Human Rights has begun to take interest in the corruption of officials; it adopted resolution 1992/50 following a debate in which the representatives of the developed countries attempted to put forward a text which presented corruption exclusively as a problem of underdeveloped countries. The effort was not successful, and the resolution recognized corruption as a universal problem.

36. The obligation of the State to punish those responsible for economic crimes covered by national law pertains to domestic jurisdiction. But when the economic damage caused by the crimes is of such magnitude that it has serious repercussions on the standard of living of the population, international norms which protect fundamental human rights come into play. In this situation, and in the absence or exhaustion of domestic remedies, or if the State declines to exercise its authority to inflict penalties, international proceedings should be initiated to examine what could constitute flagrant violations of human rights.

VII. AN INITIAL APPROACH TO THE CLASSIFICATION OF THESE CRIMES IN THE INTERNATIONAL CONTEXT

37. We are faced with a range of conduct, some of which is characterized as crime and some not, which results (regardless of whether those responsible desire it or not) in the foreseeable injury or violation of the fundamental human rights, enshrined in international instruments such as the United Nations Charter and the Covenant on Economic, Social and Cultural Rights which are mandatory because they are binding, or because they are jus cogens, such as numerous resolutions and declarations of the United Nations, beginning with the Universal Declaration of Human Rights.

38. The issue is therefore to define or characterize conduct which results in the violation of these fundamental human rights as crime. If we return to Carrara's definition, a crime is the "breach of the law of the State promulgated to protect the security of the citizens as a result of an external act of man, positive or negative, morally imputable and politically harmful". 22/ If we substitute "international community" for "State", the definition is perfectly fitting for the conduct described above.

39. Cherif Bassiouni 23/ says that there are five successive stages in the evolution of human rights: (1) the Enunciative Stage (the emergence and shaping of internationally perceived shared values through intellectual and social processes; (2) the Declarative Stage (the declaration of certain identified human interests or rights in an international document or instrument); (3) the Prescriptive Stage (the articulation of these human rights in some prescriptive form in an international instrument (general or specific) generated by an international body; or the elaboration of specific normative prescriptions in binding international conventions); (4) the Enforcement Stage (the search for, or development of, modalities of enforcement) and (5) the Criminalization Stage (the development of

international penal prescriptions). Economic, social and cultural rights can be said to fall between the prescriptive and enforcement stages (the fourth stage would be complemented by the approval of an optional protocol to the Covenant on Economic, Social and Cultural Rights). In the case of these rights, the means of protection developed up until now have proved to be insufficient. According to Bassiouni, it is therefore necessary to move on to the criminal prohibition of their violation as ultima ratio of the enforcement of internationally protected human rights.

40. Criminal doctrine should determine whether the various types of conduct prohibited in the sphere with which we are concerned constitute dangerous crimes or harmful crimes, when there is guilt and when there is deceit. But in any case, such conduct will always involve the "production of a state of affairs capable of resulting in another causal course of events considered directly harmful". 24/ Those who produce this "state of affairs", although they do not desire the harmful result and hope unfoundedly that the harmful effects will not develop, will have foreseen them, and will thus fall within the bounds of criminal guilt. Or, more likely, selfish interest will have ruled their conduct, leaving them indifferent to possible harmful effects and leading them into criminal deceit. 25/

41. The object of penalizing such conduct is to avoid, on the one hand, its repetition (general prevention) and on the other, as Romagnosi already stated in 1857 in his Genesi del diritto penale (quoted by Solar, Criminal Law, Vol. II, p. 382) to avoid "the destructive effect that impunity would have on the social body". These types of crimes are characterized by the fact that the powerful social forces that generate them almost always go unpunished. This is what Alessandro Baratta calls the "unknown quantity" of criminality: "As it has been seen, this does not by any means mean that transgressive behaviour is actually concentrated in the working class and in crimes against property. On the contrary, even liberal criminology shows, with investigations into the 'unknown quantity' of white-collar and political crime, that 'criminal' behaviour exists in all social classes. The social harm caused by forms of criminality peculiar to the largely unprosecuted ruling class is far more damaging than that caused by all forms of criminality that are actually prosecuted. The system of immunity and selective criminalization corresponds to the balance of power between the classes so as to offer broad license for the illegal practices of the ruling classes when they undermine the interests and the rights of the lower classes, or of weaker nations, and ... a more or less rigorous limitation of the sphere of political action of social emancipation movements". 26/

42. López Rey y Arrojo, quoted by Fernando Horacio Molinas, 27/ defines the abuse of power as "the ability to impose personal will on persons, groups, institutions and organizations, occasionally at the international level, so that the latter do or abstain from doing something, or accept, directly or indirectly, something which in principle they would reject". Further on he says: "While the problem of the delinquent's attack on property is generally considered as marginal, and an individual problem confronting the social order, the economic delinquent, on the other extreme, is neither marginalized nor does he individually confront the system to which he belongs; delinquents belonging to higher socio-economic groups, rather than being marginalized, are tolerated and accepted". Molinas adds: "Indeed owing to these distinctive

characteristics, economic delinquents generally enjoy social prestige, as their actions are considered audacious business deals on the edge of legality; their access to the media permits them to preserve their image among public opinion; lastly, in logical consequence, they rarely suffer criminal sanction for their acts". 28/

43. As Jescheck says so well, "the understanding of the limited impact of criminal policy in comparison with the full potential of the social forces which generate crime does not discharge science from its duty to reflect on how to improve matters in the sphere of crime". 29/ It is a question of raising the "social alarm" about this type of criminality, given that public opinion is conditioned to respond to the robbery of a purse on the street, or a homicide, yet considers the systematic plunder of entire nations, their condemnation to famine, the sickness and death of millions of people, to be the "normal order of things" or "a question of market laws".

VIII. FRAMES OF REFERENCE

44. There are at least three references which are extremely useful in discussing international economic crimes: (a) the national and international norms which seek to provide protection for the environment under criminal law; (b) the work of the United Nations International Law Commission on a draft code of crimes against humanity and (c) the comments of the Committee on Economic, Social and Cultural Rights on the various articles of the Covenant and on a possible draft of an optional protocol.

1. Crimes against the environment

45. The economic crimes to which we have been referring and crimes against the environment have a number of elements in common. The latter type almost always involves economic activities (industry, transport, exploitation of natural resources), which cause damage owing to culpable negligence on the part of an operator who decides not to take steps to protect the ecosystem so as not to reduce his profit margin. Laws which make it a crime to damage the environment are mainly intended to protect those elements of nature which are directly linked to human survival and welfare and the preservation of the ecosystem for future generations. Human survival and well-being is thus the legal property being protected, as in the case of the economic crimes which concern us here. This type of crime can be committed by individuals, corporations or States.

46. The object of penalizing crimes against the environment is to discourage conduct which is particularly harmful to society. The International Convention for the Prevention of Pollution from Ships, which has been in force since 1983, provides that the penalties laid down by the States parties should be severe enough to discourage violations of the Convention. Stiff penalties tend, for example, to avoid situations where it is cheaper for a company to pay a fine than to spend money on preventing pollution. They may include imprisonment for individual offenders and for officials of companies that break the law. 30/

47. In 1977, the Committee of Ministers of the Council of Europe adopted resolution (77) 28 on the contribution of criminal law to the protection of

the environment. Among its recommendations to the member States the following should be highlighted: (a) reconsideration of the principles of criminal liability with a view, in particular, to the possible introduction in certain cases of liability for public or private corporations; (b) consideration of the advisability of characterizing as crimes those acts and omissions which through fault or negligence expose human life or health or property of substantial value to potential danger; (c) granting persons or groups the right to participate in criminal proceedings in defence of the interests of the community; (d) prohibiting amnesties in the case of serious crimes against the environment (emphasis added). Resolution quoted by McCaffrey, pages 550-551 (see note 30).

2. The work of the International Law Commission

48. The United Nations International Law Commission has included crimes against the human environment in its draft code of crimes against humanity, and large-scale pollution of the atmosphere or the oceans in article 19 of its draft articles on the topic of State responsibility. 31/ The work of the Commission on a draft Code of Crimes against the Peace and Security of Mankind also provides an important frame of reference for work on the characterization of international economic crimes, in particular, draft article 18 (1991 text) on colonial domination and other forms of alien domination and the commentary on that article made at the Commission's forty-first session (1989). The text of the article reads: "An individual who as leader or organizer establishes or maintains by force or orders the establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations shall, on conviction thereof, be sentenced [to ...]". 32/

49. The commentary pointed out that the second part of the article, which refers to "any other form of alien domination", had been directly inspired by General Assembly resolution 1514 (XV) of 14 December 1960, which contains the Declaration on the Granting of Independence to Colonial Countries and Peoples. The draft article - the commentary continues - refers to any foreign occupation or annexation and any deprivation of the right of peoples to choose freely their political, economic or social system (emphasis added). The draft article - the commentary further states - uses a shorter form of words than the relevant text of the resolution 1514, but has the advantage of referring to all kinds of alien domination. Certain members of the Commission commented that alien domination included neo-colonialism, the exploitation of natural resources and the wealth of peoples, in violation of General Assembly resolution 1803 (XVII) of 14 December 1962 entitled "Permanent sovereignty over natural resources". 33/ It will be observed that the International Law Commission draft lists economic policies routinely followed by large transnational enterprises and the group of the most developed countries among crimes against the peace and security of mankind.

3. Comments of the Committee on Economic, Social and Cultural Rights

50. The discussions and general comments of the Committee on Economic, Social and Cultural Rights are a key reference for the topic under consideration. For example, when in 1989 the Committee began to discuss the rights set forth in article 11 of the Covenant, it dealt with the right to adequate

food. 34/ Some members said for example, that since the individual was a subject of international law it was within his power to demand respect for the obligations of the Covenant (para. 319), that the denial of the human need for food constituted a violation of a human right and that there should be a common law right of action against the State where there was a systematic deprivation of access to food (para. 321), that the excess world food resources were the common heritage of mankind's hungry and impoverished and that it would be a denial of justice to refuse access to such resources by the hungry and starving (para. 322). The FAO representative said that the right of everyone to be free from hunger was a fundamental right laid down in article 11, paragraph 2, of the Covenant, which was clearly linked to the right to life.

51. In General Comment No. 3 (1990), the Committee discussed the nature of the obligations of States parties deriving from article 2, paragraph 1, of the Covenant. 35/ For example, it was said that the adoption of legislative measures was by no means exhaustive of the obligations of States parties: rather, the expression "by all appropriate means" had to be given its full meaning; that among the measures that might be considered appropriate was the provision of judicial remedies in order to assert the rights established in the Covenant which are capable of immediate application (articles 3, 7(a)(i), 8, 10, para. 3, 13, para. 2(a), 13, para. 3, 13, para. 4 and 15, para. 3). It was also said that the fact that States were under an obligation to achieve a result ("to take steps ... with a view to achieving progressively ... the full realization of the rights recognized in the covenant") did not mean that they were not meanwhile obliged to move as expeditiously and effectively as possible towards that goal and that any deliberately retrogressive measures in that regard would require the most careful consideration (emphasis added). In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort had been made to use all resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations (paras. 4, 5, 9, 10 and 11 of General Comment No.3).

52. At its sixth session, the Committee began consideration of a discussion paper by a member of the Committee, Mr. Philip Alston, on an optional protocol to the International Covenant on Economic Social and Cultural Rights. 36/ The optional protocol, like the one to the International Covenant on Civil and Political Rights, would authorize the submission of communications reporting the failure of any State party to the Covenant to fulfil its obligations. Mr. Alston said that an optional protocol was needed and that it would be nothing new, since such proceedings already existed in UNESCO, in respect of articles 13 and 15 of the Covenant; in ILO in respect of article 8 of the Covenant; and in Economic and Social Council resolution 1503 (XLVIII), the latter being applicable to the full range of human rights, including economic, social and cultural rights. Furthermore, those procedures were already provided for in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (General Assembly resolution 45/158) or were under consideration as in the case of the Council of Europe regarding the European Social Charter. The Parliamentary Assembly of the Council of Europe had recommended in September 1991 that a series of amendments should be made immediately to the Charter, including the adoption of an effective procedure for the submission of complaints (Parliamentary

Assembly of the Council of Europe, recommendation 1168 (1991)). The members of the Committee said that an optional protocol would strengthen the practical application of the Covenant and would make it possible to focus the attention of public opinion to a greater extent on economic, social and cultural rights (emphasis added).

53. At its seventh session, in December 1992, the Committee discussed a working paper by Mr. Alston on the same subject. At the meeting, it was said that the principle, so often repeated in the General Assembly and the Commission on Human Rights, that the two blocks of human rights were indivisible, interdependent and interrelated was being undermined by the fact that whereas there were several treaty-based procedures for the submission of complaints about civil and political rights, there was no similar procedure in respect of the economic, social and cultural rights. If the latter were to be taken seriously and treated on the same footing as civil and political rights, the establishment of a procedure for reporting violations of economic, social and cultural rights must be discussed. The Committee considered several important aspects of a possible optional protocol, which will not be discussed here as they fall outside the scope of this paper. 37/

54. Although the application of the procedures of an optional protocol would not give the Committee any jurisdictional powers, the fact that the Committee could examine complaints submitted by individuals, groups, non-governmental organizations and States, and confirm and publicize specific violations of economic, social and cultural rights would be a milestone in the struggle to put an end to those violations and make world opinion more aware of the possible criminal nature of such conduct.

IV. THE ROLE OF THE FINANCIAL INSTITUTIONS OF THE UNITED NATIONS SYSTEM

55. The International Monetary Fund and the World Bank play such an important role in the adoption of economic and financial decisions that they deserve to be dealt with in a separate paragraph. In 1944, the Bretton Woods Conference decided on the establishment of both institutions. Article 1 of the Articles of Agreement of the IMF set forth the six purposes of the Fund, one of which was "to facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of productive resources". 38/ In 1947, the General Assembly approved United Nations agreements with IMF and the World Bank as specialized agencies of the United Nations system. In actual fact, both Agreements constituted more a declaration of independence of the two financial bodies than a declaration of cooperation with United Nations. Since then, efforts to induce the World Bank and IMF to coordinate their activities with the Economic and Social Council have been unsuccessful, because both institutions have refused, maintaining that they are independent. 39/

56. As regards the internal operation of IMF, article XII, section 5, of its Articles of Agreement establishes weighted voting in its governing bodies, leaving decision-making power with the five countries that have the largest quotas (United States of America, Great Britain, Germany, France and Japan). One country, the United States, can block important decisions (for example,

the re-establishment of an international system of fixed exchange rates) because it holds more than the minimum blocking vote of 15 per cent.

57. The "recommendations" and "guidelines" of IMF, which are all but mandatory for countries wishing to renegotiate debts or borrow from the international financial system, flatly contradict the purposes of the IMF as laid down in article 1 of its Articles of Agreement. The "recommendations" include liberalization of foreign trade, currency devaluation, price liberalization, freezing of wages, reduction of public expenditure (including health, social security and education) and privatization of State enterprises.

58. The World Bank, for its part, decides jointly with the IMF whether loans should be granted to the member States. Commercial banks usually release their loans only when they are certain that the borrower is satisfactorily putting a structural adjustment programme into effect. 40/ Thus, there is a vicious circle: States that wish to have access to international credit must conform to the "recommendations" of IMF (in other words, of the countries which call the tune in IMF). In reality, international loans to indebted countries are only accounting entries, because since 1984 capital has actually been flowing from South to North at an average of 21,000 million dollars per year. 41/ The beneficiaries of this net transfer of resources include IMF itself, which has had an annual average surplus of 6,300 million dollars from 1986 to 1990 in its operations with the underdeveloped countries. The World Bank also had a surplus of 1,700 million dollars in 1991. 42/

59. To sum up, the recommendations of the IMF have long-term recessionary consequences for and devastating social effects on the countries which accept them. The array of major international agencies in the service of the rich countries which lay down the law for the poor countries in economic and financial matters concludes with GATT. Since this agency operates on the basis of reciprocal concessions, the result is predictable: the weaker countries make the concessions imposed upon them by the stronger ones. In such matters as agricultural subsidies, the tighter protection of intellectual property rights (which is linked to the transfer of technology) and the liberalization of trade in services, the industrialized countries impose their points of view, to the detriment of the interests of the less developed countries. As a result, the latter lose on all fronts: in trade in commodities, manufactured goods, services and technology, although some regions may occasionally obtain marginal (and temporary) advantages from disagreements among the industrialized countries (as in the case of agricultural policy). The question of a thorough reform of the international financial bodies and of the international economic and financial system - which we will not go into here - is urgent and unavoidable and there is no shortage of proposals.

Conclusion

60. In conclusion, we think that in the fight to prevent violations of economic, social and cultural rights from going unpunished, the international community should immediately set itself three goals:

1. The adoption by the World Conference on Human Rights in 1993 or the United Nations General Assembly of a resolution declaring that the policies

and practices of the States, institutions and persons which constitute an impediment to the realization of the right to development and of economic, social and cultural rights, such as usury, illegal trafficking in currencies, deregulation of the international monetary system, serious environmental damage caused deliberately or through error or culpable omissions and, in general, the abuse of economic power to obtain concessions, advantages or disproportionate benefits through coercion, with grave injury to third parties, are offences (or crimes).

2. The drafting and subsequent adoption of an optional protocol to the Covenant on Economic, Social and Cultural Rights;

3. The submission of a request from the Economic and Social Council to the International Court of Justice for an advisory opinion as to:

(a) whether the agreements and the relations which the United Nations maintains with the International Monetary Fund and the World Bank as specialized agencies are in keeping with the Charter of the United Nations;

(b) whether the practices and policies of the World Bank and the IMF conform to the purposes for which they were established as enunciated in their Articles of Agreement, and to the Charter of the United Nations and other international instruments.

The Economic and Social Council is authorized to submit legal questions to the International Court of Justice regarding mutual relations between the United Nations and the specialized agencies. 43/

Notes

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